

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

DEC -2 2011

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Petitioner,

v.

HON. CHRISTOPHER BROWNING,
Judge of the Superior Court of the State
of Arizona, in and for the County of Pima,

Respondent,

and

PEDRO MARRUFO ONTIVEROS,

Real Party in Interest.

2 CA-SA 2011-0060
DEPARTMENT A

DECISION ORDER

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20103285001

JURISDICTION ACCEPTED; RELIEF GRANTED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Petitioner

Robert J. Hirsh, Pima County Public Defender
By Lisa M. Hise

Tucson
Attorneys for Real Party in Interest

¶1 In this special action, the State of Arizona challenges the respondent judge's order granting real party in interest Pedro Ontiveros's motion pursuant to Rule 15.8, Ariz. R. Crim. P., to preclude the state from introducing DNA¹ evidence in the underlying prosecution for possession of a deadly weapon by a prohibited possessor. We accept jurisdiction of this special action because the state has "no other means of obtaining justice on the issue raised." *State ex rel. Romley v. Hutt*, 195 Ariz. 256, ¶ 5, 987 P.2d 218, 221 (App. 1999). The state does not have an equally plain, speedy, and adequate remedy by appeal. *See Potter v. Vanderpool*, 225 Ariz. 495, ¶ 7, 240 P.3d 1257, 1260 (App. 2010) (no remedy by appeal when challenged order interlocutory); *see also* A.R.S. § 13-4032 (identifying orders from which state may appeal in criminal proceeding); Ariz. R. P. Spec. Actions 1(a) (allowing relief in absence of adequate appellate remedy). Additionally, the special action raises a question of law involving the interpretation of Rule 15.8, and questions of law are particularly appropriate for review by special action. *See State ex rel. Thomas v. Gordon*, 213 Ariz. 499, n.2, 144 P.3d 513, 515 n.2 (App. 2006). For the reasons stated below, we grant relief.

¶2 The state offered Ontiveros a plea agreement on October 4, 2010. Ontiveros rejected the offer on November 17, 2010, the plea-offer deadline. After Ontiveros disclosed a new witness just two weeks before the March 22, 2011 trial date, the state had DNA material it obtained from Ontiveros in December compared with DNA material from the handgun found under the seat of the car Ontiveros had been driving.

¹Deoxyribonucleic acid.

¶3 Relying, in part, on the decision by Division One of this court in *Rivera-Longoria v. Slayton*, 225 Ariz. 572, 242 P.3d 171 (App. 2010), Ontiveros filed a motion pursuant to Rule 15.8, requesting that the respondent judge compel the state to offer the original plea agreement or preclude the state from introducing the DNA evidence. The state refused to re-offer the plea and the respondent granted the motion based on the plain language of Rule 15.8 and the rule’s comment, precluding the state from introducing the DNA evidence. While this special action was pending, however, our supreme court vacated Division One’s decision in *Rivera-Longoria*. *Rivera-Longoria v. Slayton*, No. CV-10-0362-PR, 2011 WL 5864550 (Ariz. Nov. 23, 2011). Although the primary issue in that special action was whether the deadline of an open-ended plea offer for purposes of Rule 15.8 is the date on which the state’s offer is withdrawn, *Rivera-Longoria*, 2011 WL 5864550, ¶ 10, the decision nevertheless is dispositive of the special action before us.

¶4 The supreme court identified the state’s disclosure obligations under Rule 15.1 and Rule 15.6, as they relate to Rule 15.8. *Rivera-Longoria*, 2011 WL 5864550, ¶¶ 7-14. The court made clear the state is required to provide the defendant only with the material information and evidence specified in Rule 15.1(b) that was in the state’s “possession or control” within the thirty days preceding a plea deadline. *Rivera-Longoria*, 2011 WL 5864550, ¶¶ 14-15, *quoting* Ariz. R. Crim. P. 15.1(b); *see also* Ariz. R. Crim. P. 15.1(b)(4) (prosecutor required to “make available to the defendant” “[t]he names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests . . . or comparisons that have been completed”). The court noted that,

although Rule 15.6(a) imposes on the state a continuing duty to disclose new information as it is discovered, “Rule 15.8 disclosure obligations relate to Rule 15.1(b) evidence that is within the prosecutor’s possession or control when the offer lapses.” *Rivera-Longoria*, 2011 WL 5864550, ¶ 14.

¶5 Ontiveros’s DNA sample was neither obtained nor tested until after he had rejected the plea offer the day the offer expired. Based on both the plain language of Rule 15.8 and our supreme court’s interpretation of the rule in *Rivera-Longoria*, we conclude Rule 15.8 is not implicated here. Because the respondent judge abused his discretion, having erred as a matter of law in precluding the state from introducing the DNA evidence, we grant relief and reverse the respondent’s order granting Ontiveros’s motion. *See* Ariz. R. P. Spec. Actions 3(c) (providing abuse of discretion among bases for granting special action relief); *see also* *Potter*, 225 Ariz. 495, ¶ 14, 240 P.3d at 1262 (court abuses discretion by committing legal error). Having reached this conclusion, we need not address the state’s contentions that the sanction of preclusion was improper, that the respondent’s ruling violates the separation-of-powers doctrine, or that the evidence is admissible as rebuttal evidence.

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

Chief Judge Howard and Judge Brammer concurring.